UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 79

Docket No. SF-0353-11-0154-I-1

Mary Bennett,

Appellant,

v.

United States Postal Service,

Agency.

July 6, 2012

David Jarvis, Portland, Oregon, for the appellant.

Klara S. Hicks, Esquire, Seattle, Washington, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that denied on the merits her restoration claim as a partially recovered individual. For the following reasons, we MODIFY the initial decision and DISMISS the appeal for lack of jurisdiction.

BACKGROUND

¶2 The appellant, a mail handler with the Postal Service, served in a series of modified, limited duty assignments after partially recovering from a compensable injury in 1992. Initial Appeal File (IAF), Tab 2 at 2. On August 2, 2007, she received a limited duty offer that consisted of rewrapping damaged letters at the

Portland Processing and Distribution Center (P&DC) for 8 hours per day. IAF, Tab 5, Exhibit 12 at 14, Tab 9 at 122 of 187. On August 2, 2010, as a part of the National Reassessment Process (NRP) at the P&DC, the agency determined that it had no available work at the P&DC and offered her a limited duty assignment of 8 hours per day at the Portland Air Cargo Center (PACC), based on the medical restrictions detailed in her April 19, 2010 duty status report. IAF, Tab 2 at 2; IAF, Tab 5, Exhibit 16; IAF, Tab 9 at 14-15 of 187. On August 31, 2010, as a part of the NRP process at the PACC, the appellant was offered a limited duty assignment of 1 hour of work per day, based on her walking/standing limitation of 1 hour per day. Hearing Compact Disc, Feb. 17, 2011 (HCD-1) (testimony of Marc Kersey and the appellant). On September 2, 2010, the agency offered her another limited duty assignment at the PACC, increasing her hours to up to 4 hours per day based on updated medical documentation that allowed for walking/standing for up to 4 hours per day, as tolerated. IAF, Tab 6 at 23, Tab 9 at 102 of 187; HCD-1 (testimony of Mr. Kersey and the appellant). On the same day, the agency gave the appellant an Employee Leave Information Letter, Partial Day, which informed her that, pursuant to its search of necessary tasks meeting her medical restrictions under the NRP, it was unable to identify enough available necessary tasks within her medical restrictions in order for her to complete a full day of work. IAF, Tab 9 at 3 of 168. The agency continued to conduct its search for available necessary tasks for the appellant within her medical restrictions and was unable to identify enough to complete a full day of work. *Id.* at 6-167 of 168 (employee leave letters from September 7, through December 4, 2010). Further, the agency denied her request for reasonable accommodation because it determined that she could not perform the essential functions of her position with or without accommodation and because it searched for, and was unable to find, a vacant funded position, the essential functions of which she could perform with or without accommodation. IAF, Tab 5, Exhibit 28.

¶3 The appellant filed an initial appeal on November 26, 2010. IAF, Tab 2. She argued that she was never advised of her Board appeal rights with respect to her restoration claim or her right to appeal to the Board as a preference eligible. *Id.* at 2. She argued that the agency denied her restoration because the rewrap duties from which she was removed were still available and were being performed by other employees, that her work hours were improperly reduced from 8 hours per day to as little as 2 hours per day, that she was constructively suspended, and that the agency denied her reasonable accommodation in violation of the Rehabilitation Act. *Id.* at 2-3, 8, 10, 13, 15-16, 20-21. She also raised claims of harmful procedural error, not in accordance with law, and violation of veterans' preference. *Id.* at 9. At the prehearing conference, the parties agreed that all of the appellant's claims would be addressed in the context of her restoration and disability discrimination claims. IAF, Tab 10 at 2-3. After a hearing, the administrative judge found that the appellant failed to prove by preponderant evidence that the agency acted in an arbitrary and capricious manner in denying her request for restoration. IAF, Tab 18, Initial Decision (ID) at 7. The administrative judge found that the rewrap duties that she had been performing prior to her reassignment were absorbed into the positions of other bid holders who had insufficient hours to complete their day and whose positions included rewrapping damaged mail. ID at 3, 7-8. The administrative judge further found that the agency performed an adequate search for available work within the appellant's medical restrictions within the local commuting area. ID at 9. He concluded that the appellant failed to prove by preponderant evidence that the agency acted arbitrarily and capriciously in denying restoration. *Id.*

¶4 With respect to the appellant's allegation of disability discrimination, the administrative judge found that the appellant occupied a mail handler position and that this position required the performance of tasks beyond her medical restrictions. ID at 10. He found that the appellant did not articulate, or provide any evidence of, an accommodation that would enable her to perform the

essential functions of that position. *Id.* He further found that the agency established that there were no vacant funded positions within the appellant's commuting area that she could perform with or without reasonable accommodation and that the agency was unable to locate other available tasks within her medical restrictions within the commuting area. ID at 10-11. The administrative judge found that, under the Rehabilitation Act, the agency was not obligated to consider creating or re-creating a limited duty or rehabilitation assignment for the appellant despite her desire to return to her former modified position. ID at 12. He concluded that the appellant failed to prove disability discrimination based on a failure to accommodate. *Id.*

¶5 The appellant has filed a petition for review in which she argues that she was "furloughed from her position when her hours were reduced to 1 hour per day" and that the administrative judge erred in failing to consider her furlough claim as a preference eligible veteran. Petition for Review (PFR) File, Tab 1 at 2. She also argues that the agency committed harmful error by violating the Local Memorandum of Understanding (LMOU) when it assigned her rewrap duties to other employees. *Id.* She challenges the adequacy of the agency's search within the local commuting area. *Id.* at 3. She further argues that the agency's obligations under the Rehabilitation Act required that it search for positions outside of the local commuting area. *Id.* Finally, she argues that the agency could have accommodated her disability by allowing her to continue her rewrapping duties instead of assigning those duties to other employees. *Id.* at 4. The agency has filed an opposition. PFR File, Tab 4.

¶6 The appellant also submitted newly obtained documents on review concerning the agency's offer of a modified assignment, which included rewrapping and repairing damaged letters, to another employee. PFR File, Tab 3 at 1-3 & Exhibits A3, A4. She contends that this information contradicts the agency's assertions regarding its assignment of work and further evinces discrimination. *Id.* at 1-3. The agency argues that the Board should not consider

such evidence and that, in any event, it is immaterial to the issues in this appeal. PFR File, Tab 5.

ANALYSIS

¶7 After the appellant filed her petition, the Board issued its decision in *Latham v. U.S. Postal Service*, 117 M.S.P.R. 400, ¶ 10 (2012), which changed the jurisdictional test for a partially recovered individual from a nonfrivolous allegation of each element of a restoration claim to a preponderance of the evidence standard, in accordance with our reviewing court's decision in *Bledsoe v. Merit Systems Protection Board*, 659 F.3d 1097, 1104 (Fed. Cir. 2011). Thus, under the current test, in order to establish jurisdiction over a restoration appeal as a partially recovered individual, an appellant must prove by preponderant evidence that: (1) She was absent from her position due to a compensable injury; (2) she recovered sufficiently to return to duty on a part-time basis or to return to work in a position with less demanding physical requirements than those previously required of her; (3) the agency denied her request for restoration; and (4) the denial was arbitrary and capricious. *Bledsoe*, 659 F.3d at 1104; *Latham*, 117 M.S.P.R. 400, ¶ 10. If the appellant makes a nonfrivolous allegation of jurisdiction, she is entitled to a jurisdictional hearing at which she must prove jurisdiction by preponderant evidence. *Bledsoe*, 659 F.3d at 1102, 1106. If the appellant establishes jurisdiction over her restoration claim, she also prevails on the merits. *Latham*, 117 M.S.P.R. 400, ¶ 10 & n.9. The appellant here received a hearing in which the administrative judge evaluated her claim under a preponderance of the evidence standard and denied her restoration claim on the merits. Although we agree with the administrative judge's conclusion that the appellant failed to establish by preponderant evidence that the agency's actions were arbitrary and capricious, we modify the initial decision to dismiss the appeal for lack of jurisdiction in accordance with *Bledsoe* and *Latham*.

¶8 It is undisputed that the appellant satisfied the first two jurisdictional elements. We further find that the agency denied the appellant's request for restoration when it reduced her hours to 1 hour per day under the NRP on August 31, 2010, and when it offered her a limited duty assignment of up to 4 hours per day on September 2, 2010.[1] IAF, Tab 8, Exhibit J; HCD-1 (testimony of Mr. Kersey and the appellant); *see Kinglee v. U.S. Postal Service*, 114 M.S.P.R. 473, ¶¶ 11, 13-14 (2010). Thus, the ultimate issue is whether the appellant has demonstrated by preponderant evidence that the denial of restoration was arbitrary and capricious.

¶9 We agree with the administrative judge that there is no indication in the record that the agency's job search was geographically inadequate. The agency submitted evidence regarding the local commuting area and its daily search for tasks for the appellant from the date of its September 2, 2010 offer of modified duty through the filing of the initial appeal. IAF, Tab 6 at 61, Tab 8, Exhibit B at 5, 9-10 (declaration of Marc Kersey); IAF, Tab 9, 1-168 of 168, Tab 10 at 1, Tab 12 at 19-45. The administrative judge found that the agency properly searched for any available work within the commuting area and within the appellant's medical restrictions. ID at 8-9. The appellant challenges this finding by arguing that the agency should have presented testimony from the individuals who

---

[1] We further find that the agency's decision to reassign the appellant to the PACC was not a denial of restoration and that the appellant's challenge to this action is merely a challenge to the terms and conditions of the restoration. *See, e.g.*, *McDonnell v. Department of the Navy*, 84 M.S.P.R. 380, ¶¶ 8-10 (1999) (a partially recovered individual's appeal of his assignment to a position other than the one preferred is a challenge about the details of the restoration, not a denial of restoration, and is not within the Board's jurisdiction). The record indicates that, during her initial assignment to the PACC on August 2, 2010, she was offered 8 hours of work per day performing tasks within her medical restrictions. HCD-1 (testimony of Mr. Kersey). Although there was much argument over whether the P&DC or the PACC was her duty station, this is immaterial to our analysis here, and, indeed, the parties stipulated that this was not a dispositive issue with respect to the agency's efforts to search for available work. IAF, Tab 10 at 1.

actually conducted the search so that they could be available for cross examination. PFR File, Tab 1 at 3. The appellant, however, did not include these witnesses on her witness list, IAF, Tab 8 at 8, despite her receipt of agency documents concerning the search, IAF, Tab 9 at 1-168 of 168. Additionally, Mr. Kersey, the facility manager at the PACC, testified that he conducted the search of the local commuting area himself and that the managers simply completed the necessary paperwork, at his request. HCD-1. The appellant has not otherwise cast doubt on the agency's evidence. Further, we find unconvincing her argument that it was impossible for the agency to search the entire local commuting area on a daily basis. PFR File, Tab 1 at 3; *see Latham*, 117 M.S.P.R. 400, ¶ 56.

¶10 We consider the appellant's allegation of disability discrimination to the extent that it pertains to the jurisdictional question. *See Latham*, 117 M.S.P.R. 400, ¶ 58. A denial of restoration based on prohibited discrimination is arbitrary and capricious. *Id.* The appellant's challenges to the administrative judge's findings on her disability discrimination claims are twofold: (1) that the agency failed to search for positions outside of the local commuting area as required under the Rehabilitation Act and (2) that the agency failed to accommodate her by discontinuing her limited duty position in rewrap even though other limited duty employees were still performing rewrapping tasks. PFR File, Tab 1 at 3-4. The dispositive issue here, however, is whether she could perform the essential functions of her position or any other position, for which she was otherwise qualified, with or without reasonable accommodation.[2] 42 U.S.C. § 12111(8), (9); *see Sanchez v. Department of Energy*, 117 M.S.P.R. 155, ¶ 16 (2011);

---

[2] An appellant may establish a disability discrimination claim based on failure to accommodate by showing that: (1) She is a disabled person; (2) the action appealed was based on her disability; and (3) to the extent possible, that there was a reasonable accommodation under which the appellant believes she could perform the essential duties of her position or of a vacant position to which she could be reassigned. *White v. U.S. Postal Service*, 117 M.S.P.R. 244, ¶ 16 (2012).

Sanders v. Social Security Administration, 114 M.S.P.R. 487, ¶ 18 (2010).[3] It is undisputed that the appellant held a mail handler position and that she was unable to perform the essential functions of the position, with or without an accommodation. IAF, Tab 5, Exhibit 21; IAF, Tab 12 at 10, 12; HCD-1 (testimony of the appellant). Further, the appellant did not argue below, and does not argue on review, that there was a vacant position, for which she was qualified, with essential functions that she could perform with or without accommodation.[4] *Gonzalez-Acosta v. Department of Veterans Affairs*, 113 M.S.P.R. 277, ¶ 11 (2010). Rather, she argues that the agency should have accommodated her by continuing her limited duty assignment that consisted solely of rewrapping mail. It is well-established that the Rehabilitation Act imposes no obligation on the agency to create modified work assignments. *White*, 117 M.S.P.R. 244, ¶ 21. The provision of limited duty tasks that do not constitute a separate position is not a reasonable accommodation, and the agency is not required to create a new position for the appellant in order to provide reasonable accommodation. *Gonzalez-Acosta*, 113 M.S.P.R. 277, ¶ 13. The

---

[3] As a federal employee, the appellant's claim arises under the Rehabilitation Act of 1973, but the regulatory standards for the Americans with Disabilities Act (ADA) have been incorporated by reference into the Rehabilitation Act and are applied to determine whether there has been a Rehabilitation Act violation. 29 U.S.C. § 791(g); *Sanchez*, 117 M.S.P.R. 155, ¶ 16 n.5; 29 C.F.R. § 1614.203(b). The ADA Amendments Act of 2008 (ADAAA) became effective on January 1, 2009, and the Equal Employment Opportunity Commission subsequently issued amended regulations and guidance concerning it. *See Southerland v. Department of Defense*, 117 M.S.P.R. 56, ¶¶ 25, 33 n.9 (2011). The ADAAA, however, did not change the statutory provision regarding reasonable accommodation. *Sanchez*, 117 M.S.P.R. 155, ¶ 16 n.5; *Southerland*, 117 M.S.P.R. 56, ¶ 33 n.9. Thus, to the extent that the ADAAA applies to the adverse actions at issue here, the ADAAA and its implementing regulations do not affect the outcome of this case. *See Sanchez*, 117 M.S.P.R. 155, ¶ 16 n.5; 29 C.F.R. § 1630.2(o).

[4] Further, Mr. Kersey testified that he searched for vacant positions outside the local commuting area, and the parties agreed that the search extended at least 200 miles. HCD-1 (testimony of Mr. Kersey, agreement of counsel that the farthest facility was at least 200 miles away).

appellant's claim that the agency was required to continue employing her in a modified assignment to meet her medical restrictions is not one that is cognizable under the Rehabilitation Act. *White*, 117 M.S.P.R. 244, ¶ 21. Thus, she has failed to demonstrate that the agency's denial of restoration was arbitrary and capricious due to disability discrimination.

¶11 In *Latham*, the Board held that its jurisdiction under 5 C.F.R. § 353.304(c) may encompass a claim that an agency's violation of its internal rules resulted in an arbitrary and capricious denial of restoration. 117 M.S.P.R. 400, ¶ 11. The Board found that the Postal Service's rules required the agency to offer modified assignments to partially recovered individuals whenever work is available and within their medical restrictions. *Id.*, ¶ 30. The Board further determined that, under the agency's rules, it may discontinue a modified assignment consisting of tasks within an employee's medical restrictions only when the duties of that assignment no longer need to be performed by anyone or those duties need to be transferred to other employees in order to provide them with sufficient work. *Id.*, ¶ 31. *Latham* set forth the following line of inquiry as a relevant framework for analyzing the "availability" of work under such circumstances: (1) Are the tasks of the appellant's former modified assignment still being performed by other employees? (2) If so, did those employees lack sufficient work prior to absorbing the appellant's modified duties? (3) If so, did the reassignment of that work violate any other law, rule, or regulation? *Id.*, ¶ 33.

¶12 It is undisputed that the tasks of the appellant's former modified assignment were still being performed by other employees. IAF, Tab 13. Brian Gaines, the Lead Manager at the P&DC, testified that the employees in the "010" operation were responsible for rewrapping the damaged mail generated by the machine on which they worked to manage mail. Hearing Compact Disc, Mar. 2, 2011 (HCD-2). He also testified that bid employees in this operation did not have sufficient work to fill an 8-hour day and they absorbed the rewrap duties without any need for overtime. HCD-2. Based on the agency's evidence, the

administrative judge found that the employees who absorbed the appellant's rewrapping tasks were bid holders whose duties included rewrapping damaged mail and who lacked sufficient work to complete an 8-hour workday. ID at 3. The agency's evidence indicates that the rewrap functions were incidental to the mail handler duties in the 010 operations and performed as a part of those duties. HCD-1 (testimony of Mr. Kersey); ID at 8. Mr. Gaines testified that each employee operating a machine was responsible for rewrapping the damaged mail from his or her machine. HCD-2. The appellant did not present argument or evidence to the contrary, nor does she contest the administrative judge's finding on review. Although there was testimony regarding another limited duty employee who was given rewrapping tasks as a part of his limited duty offer, the record indicated, and the administrative judge found, that this employee's main duty was to perform mail handler tasks on the manual cull belt in the 010 operation; therefore, he was responsible for rewrapping the damaged mail resulting from his operation of that machine. ID at 8; IAF, Tab 14, Exhibit U; HCD-2 (testimony of Mr. Gaines).

¶13 Thus, this appeal turns on the third inquiry: whether the reassignment of the rewrapping duties violated any other law, rule, or regulation. The appellant has made three arguments on review that implicate this inquiry: (1) that the agency failed to conduct a proper search for available work within her medical restrictions; (2) that the agency violated the Rehabilitation Act by failing to accommodate her disability; and (3) that the agency's action was in violation of the LMOU. *See Latham*, 117 M.S.P.R. 400, ¶ 32. For the reasons articulated above, the appellant's challenges to the local commuting area and her arguments regarding the agency's obligations under the Rehabilitation Act fail.

¶14 With respect to the third argument, the appellant asserts that the LMOU provides that:

> [T]he position of Rewrap would be one of those jobs reserved for both temporary and permanent light duty . . . . We believe that by

> assigning this work to other employees (limited duty and regular non-injured Mail Handlers), the Postal Service violated the National and Local agreement between the parties and in doing that committed harmful error.

PFR File, Tab 1 at 2. The appellant, however, is a limited duty employee, not a light duty employee, and the provisions at issue do not apply to her. IAF, Tab 5, Exhibit 31 (Items M & O) (concerning light duty positions); *see Yang v. U.S. Postal Service*, 115 M.S.P.R. 112, ¶ 2 n.1 (2010) ("In the U.S. Postal Service, 'limited duty' refers to modified work provided to employees who have medical restrictions due to work-related injuries, whereas 'light duty' refers to modified work provided to employees who have medical restrictions due to nonwork-related injuries."). Moreover, even if these items in the LMOU did apply to her, her interpretation of the LMOU as set forth above is inaccurate. We do not read these provisions to require that the agency provide rewrapping duties to limited or light duty employees. Instead, these provisions set forth guidelines that include rewrapping as one of the temporary light duty options and provide that "the number of light duty assignments reserved for permanent light duty for the Mail Handler Craft shall not exceed 5% of the Full Time Regular Work Force." IAF, Tab 5, Exhibit 31 (Items M & O). The appellant has not put forth any persuasive argument or evidence that the agency violated these provisions. For the foregoing reasons, we find that the appellant failed to demonstrate by preponderant evidence that the denial of restoration was arbitrary and capricious, and we dismiss her appeal for lack of jurisdiction.

¶15 The appellant argues on review that the administrative judge failed to adjudicate her claim that she was furloughed, for which she has Board appeal rights because she is a preference eligible veteran. PFR File, Tab 1 at 1-2. Even assuming that she properly made such a claim below, a claim that a partial-day absence under the NRP could constitute a furlough is subsumed in the restoration appeal. *See Kinglee*, 114 M.S.P.R. 473, ¶ 22 & n.5. The appellant also submits new evidence on review regarding another employee, Robin Laudermilk, who was

offered a limited duty assignment in the 010 unit on June 17, 2011, which included the rewrapping of damaged mail. PFR File, Tab 3 at 1, 3, Exhibit A3. She argues that such evidence demonstrates that these tasks were available to assign to her, that this evidence contradicts the agency's argument that the rewrap tasks were not available to limited duty employees, and that such evidence proves that the agency discriminated against her. *Id.* at 2-3. We find, however, that such evidence does not affect our analysis because it is based on events that occurred well after the denial of restoration at issue in this appeal. The denial of restoration occurred in August and September 2010, and the new evidence pertains to events that occurred in June 2011. Further, the evidence supports the agency's position that the rewrap tasks were incidental to assigned duties in the 010 operation; the document submitted by the appellant reflects that Ms. Laudermilk was assigned in the 010 unit as a limited duty mail handler with the modified assignment of "facing loose mail pieces, cull belt operation, facing DVD, patching damaged mail" for 8 hours per day. PFR File, Tab 3, Exhibit A3. That Ms. Laudermilk was performing rewrap duties as a part of her 010 assignment is consistent with Mr. Gaines's testimony that each mail handler was responsible for rewrapping the damaged mail generated by the machine he or she operated. HCD-2. Finally, to the extent that the appellant is arguing that the agency discriminated against her by failing to accommodate her request to rewrap mail for 8 hours per day, such argument fails for the reasons explained above. Thus, we find that this new evidence is not material to the outcome of this appeal. *See Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980). To the extent the appellant is making an additional denial of restoration claim based on events that occurred after the events at issue in this appeal, such an argument may only be considered in the context of a new appeal.

ORDER

¶16 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.